STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the formal complaint of **HANOVER 19, L.L.C.**, against **CONSUMERS ENERGY COMPANY** for waste and the loss of natural gas and other valuable natural resources.	)))))	Case No. U-17929

At the December 20, 2016 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman
Hon. Norman J. Saari, Commissioner
Hon. Rachael A. Eubanks, Commissioner

ORDER

History of Proceedings

On August 25, 2015, Hanover 19, L.L.C. (Hanover), filed a complaint against Consumers Energy Company (Consumers), under authority conferred by Section 14 of 1929 PA 9 (Act 9), MCL 483.114, which empowers the Commission to "do all things necessary for the conservation of natural gas in connection with the production, piping and distribution thereof." On October 21, 2015, Hanover amended its complaint and on December 14, 2015, Consumers filed an answer to the amended complaint.

On December 17, 2015, Administrative Law Judge Suzanne D. Sonneborn (ALJ) held a prehearing conference, at which Hanover, Consumers, the Commission Staff (Staff), the Michigan Department of Environmental Quality (DEQ), Countrymark Energy Resources, L.L.C., and Savoy Energy, L.P. appeared.

Evidentiary hearings were held on May 13 and May 17-18, 2016, and on September 8, 2016, the Commission issued an order (September 8 order) in which it found that Consumers' refusal to accept a small amount of low-British thermal unit (Btu) gas from Hanover constituted waste under Act 9. The Commission further determined that directing Consumers to revise its agreement with Hanover to reduce the minimum Btu content of gas delivered by Hanover from 965 to 910:

> (1) would not be a substantial impairment of the agreement; (2) even if the impairment were substantial, it would serve the legitimate public purpose of avoiding waste, conserving natural gas resources, and enhancing public welfare as set forth in Act 9; and (3) the minor change to the contract is reasonable in light of the facts presented.

September 8 order, p. 40. The Commission also found that, based on the preponderance of the evidence, the small amount of Hanover gas introduced into Consumers' transmission line would mix with the higher Btu gas flowing in the line so that customer equipment and safety would not be compromised. Finally, in order to allay the company's concerns, the Commission directed Consumers to undertake weekly testing of the Btu content of the gas at the city gates located on either side of the Hanover interconnect, at Hanover's expense.

On October 7, 2016, Consumers filed a petition for rehearing, and on October 28, 2016, Hanover, the Staff, and DEQ filed responses opposing the petition.

Petition for Rehearing and Responses

Consumers contends that the testing procedures set forth in the September 8 order were not recommended by any party to the proceeding and are inadequate to protect the company and its customers. To address this concern, Consumers states that it intends to install continuous monitoring gas chromatographs at the two city gates nearest to the Hanover interconnect. Consumers requests that the Commission order Hanover to cover the costs of the additional

monitoring. According to Consumers, the testing method that the Commission ordered does not account for the significant variability in the gas flow from Hanover, the Btu content of that gas, and the amount of gas flowing on Consumers' line. Consumers argues that taking discrete samples from two points on the line, once a week, will not reflect this variability.

In addition, Consumers claims that the Commission order is unclear as to what should happen if the Btu content of Hanover's gas were to drop below 915 or if the testing at either city gate shows that the overall heating value of the gas stream has fallen below the minimum 965 Btu requirement set forth in the Technical Standards for Gas Service. Consumers requests that the Commission clarify both the lowest acceptable heating value of Hanover gas and what consequence should occur if the heating value of the gas measured at either city gate falls below 965 Btu.

Next, Consumers claims that the September 8 order was based on a number of legal errors, the most significant of which, according to Consumers, was "the Commission's determination that the burden of proof had somehow been shifted to Consumers Energy to demonstrate that Hanover's low heating value gas would not mix on the Company's system and that its Order is not prohibited by the Contract Clauses of the United States and Michigan Constitutions." Petition for rehearing, p. 3.

With respect to the burden of proof, Consumers contends that the burden only shifts when one party establishes a prima facie case. Consumers agrees that Hanover bore the ultimate burden to demonstrate that waste of gas was occurring and that waste, in the form of unnecessary flaring, could be prevented because Hanover gas would safely mix with the remaining gas stream in the pipeline. However, Consumers argues that none of the underlying premises concerning the mixing of the two gas streams was objectively proven through expert testimony, engineering studies,

manuals, or other authoritative analyses. Consumers further contends that even if Hanover had made a prima facie showing, the company effectively rebutted Hanover and the Staff's evidence. Consumers claims that the Commission incorrectly determined that the Staff's Reynolds number computation was valid, despite the fact that the company provided evidence that the minimum flow on the pipeline was 456 thousand cubic feet (Mcf) per day, and not the 100,000 Mcf that the Staff assumed in its revised analysis. According to Consumers, using the company's correct minimum flow amount the Reynolds number equals 14, indicative of laminar rather than the turbulent flow that the Staff calculated

Consumers also maintains that it had no notice that the burden of proof was shifted, thus violating "prevailing notions of procedural due process." Petition for rehearing, p. 14, quoting *Zenith Indus Corp v Dep't of Treasury,* 130 Mich App 464, 468; 343 NW2d 495 (1983). Consumers points specifically to the Staff's revised Reynolds number calculation, presented after the company had submitted its testimony and rebuttal. "Hence, if that was truly an effective point at which the burden supposedly shifted to Consumers Energy to put forward additional evidence, Consumers Energy clearly had no notice of it and no opportunity to meet such a burden." Petition for rehearing, p. 19.

In addition to its arguments concerning burden of proof, Consumers contends that the Commission misconstrued and misapplied the Contract Clause analysis set forth in *Energy Reserves Group, Inc v Kansas Power & Light Co,* 459 US 400; 103 S Ct 697; 74 L Ed 2d 569 (1983). According to Consumers, in finding that the contract between Hanover and the company would not be substantially impaired, the Commission erroneously failed to consider the degree of reliance that Consumers placed on the minimum Btu standard set forth in the contract. Further, Consumers argues that although the Commission determined that the prevention of waste was a

substantial public purpose, the applicable law states that the Commission is empowered to prevent unnecessary waste. Consumers reiterates that if there is no alternative to flaring, the flaring of the gas is necessary, and it therefore cannot be considered unnecessary waste. Consumers adds that the Commission misstated the company's position on shutting in the wells as an alternative to flaring. Consumers now posits that the Commission has direct legal authority under Section 14 of Act 9 to shut in the producing oil wells to prevent the waste of natural gas, which was what the company in fact suggested. According to Consumers, shutting in the wells is a viable option if flaring of the gas is in fact unnecessary waste.

Finally, Consumers avers that the Commission improperly applied the third step of *Energy Reserves* by finding that the adjustment to the contract (i.e., requiring Consumers to accept gas with a minimum Btu content of 910 rather than 965) was reasonable. Consumers argues that the actual legal standard "is not whether the adjustment is reasonable. It is whether the conditions supporting the adjustment are reasonable and (critically) whether the adjustment is 'of a character appropriate to the public purpose justifying the legislation's adoption.'" Petition for rehearing, p. 28. Consumers repeats that the more reasonable course of action would be to shut in all of the wells or shut in the wells that are the source of the low-Btu gas processed at the Hanover facility. Consumers adds that shutting in the wells places the burden on the party that is actually causing the waste.

In response, Hanover maintains that the Commission should reject Consumers' petition for rehearing on grounds that the petition does not meet the standard for rehearing under Mich Admin Code R 792.10437 (Rule 437). Specifically, Hanover argues that there have been no unintended consequences resulting from the order and that the September 8 order was legally sound and based on substantial evidence. Hanover asserts that Consumers failed to demonstrate how the variability

in Btu content of Hanover's gas will affect Consumers' system noting that the contract between Consumers and Hanover already limits the amount of gas that Hanover may deliver to Consumers if the pipeline volume reaches a certain level. Hanover also disagrees that the testing requirements that the Commission ordered are inadequate. If Consumers believes that more testing is required, Consumers may implement additional testing at its own discretion and cost.

Hanover disputes that the September 8 order creates uncertainty with respect to what is required of the parties. Hanover points out that the requested relief, which the Commission granted, allows Hanover to deliver up to 2 million cubic feet (MMcf) of gas per day, with a Btu content no lower than 910, provided that the pipeline receiving the gas is transporting a minimum volume of 100 MMcf per day. Hanover further explains that the interconnection agreement, which remains unchanged except for the minimum Btu content of the gas delivered, already provides for a maximum amount of gas that can be delivered and a minimum pipeline flow. If any of these parameters is violated, Consumers has the right to refuse delivery of Hanover gas.

Hanover argues that, contrary to Consumers' contention, the Commission did not improperly shift the burden of proof. Hanover points out that the Commission weighed the evidence both for and against Hanover's claims concerning waste of gas and whether Hanover's gas would adequately mix with the remaining gas in the pipeline. Ultimately, the Commission determined that Consumers failed to provide sufficient evidence to counter those claims. According to Hanover, Consumers simply disagrees with the Commission's findings. Hanover further argues that the purported legal errors related to the Commission's Contract Clause analysis are another example of Consumers' disagreement with the Commission's decision.

The Staff likewise urges the Commission to reject Consumers' petition for rehearing, while suggesting that the Commission might provide some clarification regarding the frequency,

duration, cost, and follow up for the testing of gas at the city gates on either side of the Hanover interconnect. The Staff points out that there may be significant periods when the processed gas from Hanover meets the minimum 965 Btu standard and that the Commission might clarify that testing should begin only when the Btu content of processed gas from Hanover falls below the limit of 915 specified in the Commission order. The Staff further recommends that the Commission explain that it is not ordering Consumers to accept Hanover gas that falls below 910 Btu. If the Btu content of Hanover gas reaches or falls below this level, Consumers may shut in the interconnect. Finally, the Staff indicates that it is clear from the September 8 order that Hanover may only be charged the reasonable costs of testing Hanover gas. Accordingly, the cost associated with continuous monitoring by gas chromatograph should be borne by Consumers.

With respect to the remainder of Consumers' petition, the Staff contends that the company did not present any significant errors or unintended consequences, "but rather uses semantics and the repetition of known inconsequential facts, to try to make the Commission doubt its reasoning." Staff's reply p. 5.

The Staff argues that rather than shifting the burden of proof to Consumers, the Commission weighed the evidence and determined that the Staff and Hanover presented sufficient evidence to demonstrate that Hanover's gas would adequately and safely blend with the remaining gas in the pipeline under the circumstances. The Commission also found that Consumers failed to present sufficient evidence to rebut the Staff's and Hanover's case. The Staff further contends that the burden of proof may shift many times over the course of a proceeding and notice of such a shift is not required. The Staff specifically responds to Consumers' claim that the Commission relied on the Staff's revised testimony without providing the company notice or an opportunity to address the Staff's changes to its Reynolds number computation. The Staff points out that Consumers did

not object to the Staff's revision at the time it was presented and that, in any event, the Staff's correction simply aligned the Reynolds number calculation with the minimum pipeline flow set forth in the contract between the parties. The Staff reiterates that the Commission weighed the evidence presented by Hanover, the Staff, and Consumers and found that the evidence favored Hanover's position.

The Staff further maintains that Consumers has presented no evidence that was not already contained in the record. And the Staff contends that Consumers' arguments regarding the application of the Contract Clause to the facts at issue in this case were fully considered and rejected in the September 8 order.

Discussion

The standard for a petition for rehearing is set forth in Rule 437 (formerly Rule 403):

> A petition for rehearing based on a claim of error shall specify all findings of fact and conclusions of law claimed to be erroneous with a brief statement of the basis of the error. A petition for rehearing based on a claim of newly discovered evidence, on facts or circumstances arising subsequent to the close of the record, or on unintended consequences resulting from compliance with the decision or order shall specifically set forth the matters relied upon.

In addition, the Commission has repeatedly held that a petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing.

The Commission agrees with Hanover, the Staff, and the DEQ that Consumers has generally failed to demonstrate any legal or factual errors, newly discovered evidence, or unintended consequences of the September 8 order. Consumers' arguments with respect to the Commission's

analysis of the three-part test set forth in *Energy Reserves Group* merely restate the company's arguments made in its brief and reply brief.

As for Consumers' claim regarding the burden of proof, the Commission has consistently held that in a formal complaint proceeding, the burden of proof never shifts, but the burden of going forward with the evidence shifts to the respondent if the complainant makes a prima facie case. Here, the Commission found that Hanover established a prima facie case that gas was being wasted unnecessarily and that Hanover's gas would safely mix with the remaining gas in the transmission line under the circumstances presented:

> In determining whether a party has carried a burden of proof, no special requirement of a degree of persuasion is generally applied. The agency finding of fact must be supported by evidence, and reflect a judgment that the evidence preponderates in favor of the finding, but it may be based on reasonable inferences of fact. [Citing, by way of example, *Zytkewick v Ford Motor Co*, 340 Mich 309; 65 NW2d 813 (1954.)] Crampton, Holmes, *The New Michigan Administrative Procedures,* Institute of Continuing Legal Education, 1970, pp. 121-122.

July 25, 1980 order in Case Nos. U-5825 and U-5878, p. 7. At that point, the burden of going forward shifted to Consumers to demonstrate that there was no unnecessary waste and that the gas supplied by Hanover would not mix with the remaining gas in the pipeline. While Consumers provided some testimony that mixing would not occur and argued that if waste was occurring, it was necessary waste, the Commission found overall that the evidence and arguments preponderated in favor of the Staff's and Hanover's position that the gas streams would mix and that unnecessary waste was occurring.

The Commission also rejects Consumers' claim that the burden of proof was shifted without notice, in violation of the company's right to due process. As the Staff points out, Consumers did not object to the Staff's revision to its testimony and Consumers' rebuttal concerning the absolute

minimum flow in the pipeline was not relevant, given that the agreement provides that Consumers has the right to shut in the interconnection if the flow in the pipeline is 100,000 MMcf or less.

Nevertheless, the Commission recognizes that the testing requirements set forth in the September 8 order (i.e., weekly testing for one month at the city gates on either side of the Hanover interconnect), which the Commission directed to assuage Consumers' concerns, did not accomplish that goal. As Consumers indicates in its petition for rehearing, and as the testing reports filed in the docket show, during the one-month testing period after the September 8 order, the Btu content of Hanover gas did not fall below 965. Thus, Consumers lacks assurance that the small amount of low-Btu gas from Hanover will in fact adequately mix with the remaining stream of gas in the pipeline as the Commission determined would occur in the September 8 order.

After reviewing the testimony and other evidence from the proceeding, it appears that, historically, when certain wells connected to the Hanover processing facility are producing larger amounts of low-Btu gas, the Hanover interconnect is shut in for several days. Once these wells are producing less natural gas, the Btu content of the processed gas rises back to 965 or more, and the interconnect is reopened. Therefore, the Commission is revising its requirements so that the monthly testing shall not begin until the monitoring at the Hanover interconnect indicates that the Btu content of the processed gas has dropped below 965. At that point, and for one month only, Hanover shall cover the costs of the continuous monitoring at both city gates.[1] After that month, if Consumers wishes to continue to monitor continuously, the company may do so at its own expense. Consistent with the September 8 order, and recognizing the changed circumstances with

[1] In its petition, Consumers pointed out that the monthly cost of continuous monitoring is less than the cost of weekly spot monitoring.

respect to monitoring, the Commission further directs an additional one month of monitoring, paid for by Hanover, in the event that the Btu content of Hanover gas falls to 915.

The Commission reiterates that the only change to the interconnection agreement between Hanover and Consumers was to decrease the lower Btu limit from 965 to 910. If Hanover gas falls below the 910 limit, Consumers may shut in the interconnect. Similarly, no matter what the Btu content of the gas, if Hanover's delivery exceeds the 2 MMcf per day limit, or if the flow in Line 1200 drops below 100 MMcf per day, Consumers may shut in Hanover's gas in accordance with the existing agreement. If the Btu content of the gas measured at the city gate on either side of the Hanover interconnect falls below 965, Consumers shall shut in the Hanover interconnect and shall immediately contact the Commission Staff to request an investigation to determine the cause of the drop in Btu content.

THEREFORE, IT IS ORDERED that:

A. If the British thermal unit content of processed gas from Hanover 19, L.L.C., falls below 965, Hanover 19, L.L.C., shall cover the cost for continuous monitoring of the gas at the first city gates located east and west of the Hanover 19, L.L.C interconnect for a period of one month only, and daily reports shall be provided to Hanover 19, L.L.C., and the Commission Staff.

B. If at any time the British thermal unit content of the gas measured at either of the city gates adjacent to the Hanover 19 interconnect measures less than 965, Consumers Energy Company shall shut in the Hanover 19 interconnect and shall immediately inform the Commission Staff.

C. In the event that the British thermal unit content of processed gas from Hanover 19, L.L.C., reaches 915, Hanover 19, L.L.C., shall again cover the cost for continuous monitoring of the gas at the first city gates located east and west of the Hanover 19 interconnect for a period of one month only, and daily reports shall be provided to Hanover 19, L.L.C. and the Commission Staff.

D. In all other respects, Consumers Energy Company's petition for rehearing is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so by the filing of a claim of appeal in the Michigan Court of Appeals within 30 days of the issuance of this order, under MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of the Attorney General - Public Service Division at pungp1@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

Sally A. Talberg, Chairman

By its action of December 20, 2016.

Norman J. Saari, Commissioner

Kavita Kale, Executive Secretary

Rachael A. Eubanks, Commissioner
(Abstaining)